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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 384

CORNELL STEAMBOAT COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.

No. 385

BOSTON TOWBOAT COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

ROBERT R. ERSKINE,
Counsel for Appellant,
Cornell Steamboat Co.;
ALBERT T. GOULD,
CHARLES S. BOLSTER,
Counsel for Appellant,
Boston Towboat Co.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL No. 21-35.

CORNELL STEAMBOAT COMPANY,
Plaintiff,
against
UNITED STATES OF AMERICA,
Defendant,
AND
INTERSTATE COMMERCE COMMISSION,
Intervening Defendant,
AND
BOSTON TOWBOAT COMPANY,
Intervening Plaintiff,
AND
NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Intervening Defendant.

JURISDICTIONAL STATEMENT OF CORNELL STEAMBOAT COMPANY, PLAINTIFF, PURSUANT TO RULE 12 OF THE RULES OF THE UNITED STATES SUPREME COURT.

1.

The Supreme Court of the United States has jurisdiction to review on appeal the final judgment here in question under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219-220, 28 U. S. C. Secs. 47, 47a and Sec. 238 of the Judicial Code as amended, 28 U. S. C. Sec. 345.

2.

The final decree and judgment of the United States District Court for the Southern District of New York sought to be reviewed herein is dated July 30, 1943, and was entered in that court on August 2, 1943.

The application for appeal in support of which this statement is made is presented on August 10, 1943.

3.

The Statute involved is the Transportation Act of 1940 (September 18, 1940, Ch. 722, 54 Stat. 899), which may be cited as Part III of the Interstate Commerce Act (49 U. S. C. 901, 54 Stat. 929).

This statute subjected carriers by water to regulation by the Interstate Commerce Commission.

4.

Cornell Steamboat Company, the plaintiff, filed a petition in the United States District Court for the Southern District of New York, invoking the jurisdiction of that court under the provisions of U. S. C. Title 28, Secs. 41 (28) and 43-48 inclusive, to enjoin, set aside, suspend and annul a certificate and order of the Interstate Commerce Commission dated February 2, 1943, in which the Commission ruled that plaintiff may continue its business of furnishing towage services for hire only on the basis that it is a common carrier by water and subject to the rules and regulations of the Commission under the provisions of Part III of the Transportation Act of 1940, and denied the petition of the said Cornell Steamboat Company to dismiss its application for a permit to engage in the business of a contract carrier.

The plaintiff contends that, on the undisputed facts, its business is solely that of furnishing towage services under contract, as an independent tower, that it is not a carrier,

is not engaged in the business of a carrier, and is not subject to the Act. It also contends that if it be subject to Part III of the Act, its status in any event should be limited to that of a contract carrier, and that its towage services between New York City and points in New York State on the Hudson River are not interstate commerce within the meaning of Part III, Sec. 302 (i) (1) of the Interstate Commerce Act.

After a final hearing before three judges, convened pursuant to 28 U. S. C. 47, 38 Stat. 220, the District Court dismissed plaintiff's petition, holding in its opinion, findings and conclusions that the Commission's certificate and order was not erroneous and that plaintiff, in its business as an independent tower, is a common carrier by water engaged in transportation in interstate commerce within the meaning of Part III of the Interstate Commerce Act and that the statute as applied by the Commission to the plaintiff is not violative of any part of the United States Constitution.

There are appended hereto copies of the opinion (Appendix A) and the findings of fact and conclusions of law (Appendix B) of the District Court, the Report of the Commission on Reargument (Appendix C) and the certificate and order thereon dated February 2, 1943 (Appendix D), the Report of the Commission (Appendix E) and the certificate and order thereon dated June 15, 1943 (Appendix F), and the Report of the Examiner (Appendix G).

Dated, August 10, 1943.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRAIN,
Attorneys for Plaintiff,
BY ROBERT S. ERSKINE,
A Member of the Firm;
120 Broadway,
New York, N. Y.

APPENDIX "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civ. 21-35.

Cornell Steamboat Company, *Plaintiff*,

vs.

United States of America, *Defendant*.

Before Frank, Circuit Judge and Coxe and Bright, District Judges.

Kirlin, Campbell, Hickox, Keating & McGrann (Robert S. Erskine, of Counsel), for plaintiff;
Robert L. Pierce, Special Assistant to the Attorney General, for the United States;
E. M. Reidy, Assistant Chief Counsel, for the Interstate Commerce Commission;
Tom C. Clark, Assistant Attorney General (Daniel W. Knowlton, of counsel) for defendant;
Foley & Martin (James A. Martin and Christopher E. Heckman, of counsel) for National Water Carriers Association, Inc., Intervenors,
Bingham, Dana & Gould (Boston, Mass.) for Boston Tow Boat Company, Intervenors.

Suit by plaintiff against the Interstate Commerce Commission, complaining of an order entered by the Commission pursuant to Part III of the Interstate Commerce Act. Dismissed.

The plaintiff, Cornell Steamboat Company, a New York corporation, filed an application with the Interstate Commerce Commission for a permit as a "contract carrier by water" under Part III of the Interstate Commerce Act, to continue its operation under the so-called "grandfather" clause of that Act as a "contract carrier"; that clause (§ 309) provides for the issuance, without proof that the

public convenience and necessity will be served thereby, of a certificate to a carrier engaged in bona fide operations on January 1, 1940, and continually since then, either as a "contract carrier" or a "common carrier". In the alternative, plaintiff asked that its application be considered one for the appropriate form of authority. In its application plaintiff also stated that it was filing the same without prejudice to its contention that it was not a carrier and that it was not subject to the jurisdiction of the Commission; at the same time, plaintiff filed with the Commission a petition to dismiss its application on the same grounds. Evidence was taken before a Commission Examiner who made a proposed report to the effect that plaintiff was a "grandfather" contract carrier. Exceptions to this report were argued before Division 4 of the Commission which held that the plaintiff was "a common carrier by water," entitled to a "grandfather" certificate as such and that such a certificate should issue. On plaintiff's motion, the matter was re-argued before the full Commission which, with a slight modification,[1] affirmed the opinion and findings of Division 4 and entered an order accordingly.

The evidence before the Commission showed the following: The plaintiff for many years before and on January 1, 1940, and continuously since then, owned tugboats which it used to furnish towage services for hire on the Hudson River between Waterford, New York, and New York City, New York, and upon the waters of New York Harbor or the waters surrounding New York City.[1a] At the time of the hearing, plaintiff owned thirty-three tugs. It furnishes its services to barges, scows and similar vessels which themselves usually carry cargoes. Plaintiff does not

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[1] The modification, pursuant to § 303(g), provided that no certificate was required for towage performed by plaintiff wholly within New York Harbor, since plaintiff is not, as to such towage, a party to any arrangement for the through carriage of the barges towed or their cargoes to points outside New York State.

[1a] Plaintiff was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president who has held that position for the past 29 years. From its inception, the business of plaintiff has been, and still is, owned by succeeding generations of the same family.

carry any freight or passengers on its tugs. The tugs merely attach their towing lines to the vessels to be towed and move them to points of destination as directed by the owners or operators of those vessels. Each of those vessels thus towed has its own captain on board; plaintiff's employees have nothing to do with the carrying of any cargo on those vessels. Plaintiff issues no bills of lading or similar documents for any such cargoes, and has no arrangement with anybody except the owners or operators of such vessels.[1b] Over 70% of plaintiff's customers are shippers who own or operate towed barges used in carrying their own merchandise. The largest part of its business is done on time contracts entered into for a period of years; some contracts run for a single year; from 12% to 13% of its business is done under miscellaneous contracts arranged from day to day. Arrangements for all its towing services are based on separate agreements.

[1b] It has no direct or indirect interest in, and often has no knowledge of, the character of those cargoes, or of the origin or final destination thereof. Its responsibilities begin when the vessel is taken in tow and ends when the tow is left at the agreed destination. It has nothing to do with the contractual arrangements between the barge-owners and the cargo-owners as to any forwarding or delivery of the cargo. It takes no part in, and has no interest whatever in, and no knowledge of, the arrangements between the owners of the cargoes and the barge-owners either with respect to freight-rates or with respect to any other terms of their contract to carry. Plaintiff's charges are agreed on in its contracts with the owners or operators of the towed vessels, are not dependent in any way upon the freight monies between those vessels and their cargoes, are direct charges against the barge-owners under its contracts with them, and are secured by maritime liens against the vessels towed and not against their cargoes. The agreed towage charges depend upon the size of the vessel towed and her carrying capacity, but the volume, character or weight of the cargo is of no other concern to plaintiff. The rate is lower if the barge is towed with others in a flotilla which plaintiff schedules for its customers to leave New York Harbor on certain days of the week or to leave Albany, New York, or some other point on the Hudson, on certain other days of the week. The regular service is maintained under contracts to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. If a customer desires individual service on a certain date, the rate is higher.

While approximately 95% of its services
ing from points of departure in New York
of destination in the same State, most of its
New Jersey waters, as the New York-New Je
follows the middle of the river and because
channel of the river for some seven or ei
west of the boundary line. A small amount,
of plaintiff's towing service is rendered
in New Jersey adjacent to the Hudson Rive
Harbor and points outside the harbor in N

The Commission held that plaintiff w
interstate commerce as "a common carrie
towing vessels in the performance of towa
propelled freight-carrying vessels between
New York Harbor, New York, and New Jer
ford, New York • • • and intermedi
the Hudson River." In making its finding
tiff, pursuant to the Act, is a common carr
held itself out as such, the Commission re
ticular to the testimony of plaintiff's presid
the footnote.[1e]

1e "Q. Within the range of your operation, with c
being favorable, contents of the barges being what yo
be, will you tow for anyone seeking your services?
yes.• • • We don't hold ourselves out at all. As
orders, as I mentioned. I think that 12 or 13 percen
miscellaneous business. People will call up today
want us to take a barge from here to there. We ask
it is and how much it carries, and we give them a pr
job. The rest is all by yearly or regular arrangeme
even down to the naming of the barge that they w
We have some on the blacklist, whom we do not to
that they don't pay. • • •

"Q. But if there is some boat-owner who may take
contract with you—and provided that the vessel as is
the credit arrangement are satisfactory—you will t
fleet? A. Surely—if he gives us an order for it befo

The Commission also pointed out that that san
that in the tows that leave New York nightly for
have practically no limits; we take all that will co
that by 'all that will come' he meant, 'individual
who have made arrangements with us. • • •
order for the barge before the barges leave the stak

Plaintiff began this suit, pursuant to 28 U. S. C. A. §§ 41 (27-28) and 43-48, praying that the Commission be ordered to grant plaintiff's petition to dismiss its application or, in the alternative, that this court direct the Commission to issue to plaintiff a certificate as a contract carrier.[1d] The evidence presented at the hearing before this court consisted solely of the petitions filed before, the testimony presented to, and the opinion, findings and orders of, the Commission.

FRANK, Circuit Judge:

1. Plaintiff contends that, as a tower, it is not a "carrier by water" within the meaning of the Act. We cannot

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testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: 'We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price.' Sometimes prepayment of charges has been required. As to the breadth of applicant's willingness to transport: Witness testified that 'Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract, and show him what kind of service we can give, and he gives us the contract.' And again, respecting the daily towing schedules: 'The business has been going on for so long that everybody knows it.'"

Division 4 notes the testimony that plaintiff sometimes refused request for services when they could not be rendered without injuring one of the regular customers, saying, "How such injury could result is not explained, and, in view of the evidence that there is practically no limit to the number of barges it can include in a flotilla, the statement is unintelligible." The Commission regarded as immaterial the fact that plaintiff frequently had declined to perform towage unless it was given a release from all liability, including liability for negligence."

The Commission stated: "We find that the evidence discloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, constitutes one a common carrier."

[1d] National Water Carriers Association, Inc., and The Boston Towing Company, having been permitted to intervene in the Commission's proceedings, sought intervention in this suit. Objections to these interventions were made, but were later withdrawn and the interventions were accordingly permitted.

agree. Plaintiff literally "engages in the transportation by water of * * * property * * * for compensation," which is the test under § 302(c) and (d). For the dictionary tells us that, nautically, to transport is "to haul a vessel by hawsers". And a barge is both a "vessel" and "property". Section 302(h) states that transportation "includes the use of any transportation facility" and § 302(g) includes, in the term "transportation facility", "any vessel", in turn, is defined in §302(f) to mean "any watercraft".[1e] Plaintiff, however, argues that § 302(g) also defines "transportation facility" to include "any * * * wharf", and yet the Commission has held that wharfingers are not within the Act;[2] but the Commission so held because the legislative history showed a clear Congressional intent to exclude wharfingers. Finally, and most important, § 303(f) (2) which expressly excludes certain kinds of towage would be meaningless if towage generally were not included; and plaintiff's activities are not within the excluded varieties of towage.

2. Plaintiff argues that even if it be a "carrier by water" within the meaning of the Act, it is not a "common carrier by water". Plaintiff points to decisions in which, before the passage of this Act, persons engaged in activities such as that in which it engages were held not to be common carriers. It is suggested that, accordingly, the constitutional power of Congress to regulate plaintiff as a common carrier is doubtful and that a statute should be so construed as to avoid raising grave doubts as to its constitutionality. But, since *Nebbia* v. *New York*, 291 U. S. 502 and *Olsen* v. *Nebraska*, 313 U. S. 236, there have been no such doubts; for it is now well settled that "there is no closed class or category * * * of businesses affected with a public interest". There is no need to repeat here what was said in *Fordham Bus Corporation* v. *U. S.*, 41 Fed. Supp. 712, 715, where this very question was fully discussed with reference

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[1e] Cf. *Union Stockyards & Transit Co.* v. *U. S.*, 308 U. S. 213, 217.

[2] *Status of Wharfingers*, 215 I. C. C. 633.

to the regulation of motor carriers under Part II of this Act.[3]

We fail to understand plaintiff's contention that, because it was not a common carrier for purposes of liability under the Harter Act or otherwise in Admiralty or at common law, this Act should be construed as not intended to include it as a common carrier; for in § 320(d) [4] Congress showed that it had in mind the difference between the question of liability and that of regulation. By labeling persons such as plaintiff "common carriers" in this Act, they do not become such for all purposes; this is made clear by § 302 which, in so labeling them, expressly states that it does so "for the purposes of this Act." And see *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 199, 211-212; *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *Liverpool Steam Company* v. *Phenix Insurance Co.*, 129 U. S. 397, 440.

That plaintiff supplies merely the hauling power and has no contractual relations with those who ship their goods on the barges t wed by plaintiff is irrelevant, as appears from decisions as to similar situations with respect to railroad carriers under Part I of this Act.[5]

Plaintiff urges that Congress could not have intended it to be classified as a common carrier under the Act because it was not such before the passage of the Act and because the "grandfather" clause § 309(a), provides that, if a carrier was in operation "as a common carrier by water" on a stated date before the Act was enacted. It is entitled to a "grandfather" certificate. But clearly what Congress meant was that a person is entitled to such a certificate if, on

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[3] Cf. *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23, which indicated that one who was a "contract carrier" under a state permit can claim "grandfather" rights as a common carrier under Part II of this Act.

[4] §320(d) reads: "Nothing in this part shall be construed to affect any law of navigation, the Admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation or custom not in conflict with the provisions of this Part."

[5] *U. S.* v. *California*, 297 U. S. 175, 182-183; *Union Stock Yard & Transit Co.* v. *U. S.*, 208 U. S. 213, 219; *U. S.* v. *Brooklyn Terminal*, 249 U. S. 296, 305; *Belt Ry. Co.* v. *U. S.*, 168 F. 542, 544; *U. S.* v. *Sioux City Stockyard Co.*, 162 F. 556.

the specified date before the enactment of the legislature, it had been engaged in activities which, after the statute went into effect, would constitute it a common carrier.[6]

There is substantial evidence to sustain the Commission's finding that plaintiff so "holds itself out to the general public" [see § 302(d)] that it is a "common" and not a "contract carrier". The differentiation between a "common" and a "contract" carrier is well explained by Judge McGuire in *Doyle Transfer Co.* v. *U. S.* 45 Fed. Supp. 691[7]; that case, to be sure, related to Part II of the Act, but the definitions of "common" and "contract" carriers in Parts II and III are identical (excepting that in the latter "by water" appears in the place of "by motor vehicle".) See also *Fordham Bus Corporation* v. *U. S.*, 41 Fed. Supp. 712, 717-718.

It goes without saying that, since there is substantial evidence to support the Commission's finding, we must sustain it, whether or not we would have made that finding,[7a] and also that it is not our province to consider the wisdom of the legislation. On the basis of the finding, we hold that the Commission's conclusion and order was not erroneous.

3. Plaintiff argues that, in any event, it is not engaged in transportation, under § 302(i)(I), "wholly by water from a place in a state to a place in another state". Literally, of course, it is, for it transports from a "place" in the waters of New York to a "place" in the waters of New Jersey.

The language of Part I, § 1(I), as to railroads is virtually the same, i.e., "from one state * * * to any other state". That language was construed, many years before

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[6] Note that the "grandfather" clause of Part II, as to motor carriers, § 206(f), is identical in language with § 309(f) and see *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23; cf *Fordham Bus Corp.* v. *U. S.*, 41 Fed. Supp. 712.

[7] See the legislative history and the Commission decisions there cited and quoted.

[7a] See e. g., *Sperry Gyroscope Co., Inc.*, v. *N. L. R. B.*, 129 F. (2d) 922, 924 (C. C. A. 2) and cases there cited in note 1. That there were dissenting opinions filed by some of the Commissioners is immaterial. Cf. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 674-675.

the enactment of Part III, to apply to continuous transportation beginning in a state, running through a second state, and returning to the first state. *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404; *United States* v. *D. L. & W. R. Co.*, 152 Fed. 269. It is true that this interpretation has been said (152 Fed. at 272) to be strengthened by the fact that §1(2) in Part I provides that jurisdiction over railroads shall not apply "to transportation * * * wholly within one state". But § 303(h) in Part III similarly precludes jurisdiction, as to water carriers, over "intrastate transportation". As the Commission says, if the words "wholly within a state" in Part I fortify the conclusion that it has jurisdiction under Part I over transportation between points in a single state through another state, the language quoted above from § 303(h) fortifies a similar conclusion under Part III.

Plaintiff points to the fact that, in 1935, Congress in § 203(10), Part II, as to interstate motor carriers, conferred jurisdiction by expressly defining "interstate commerce" to mean "commerce between any place in a state and any *place in another state or between places in the same state through another state*".[8]

Plaintiff argues that the omission from the definition of "interstate transporation" in part III of the words we have italicized in this provision in Part II conclusively shows that Congress did not intend to confer such jurisdiction as to water carriers. Had Parts II and III been enacted at the same time, that argument would have been persuasive, but Part III was enacted in 1940, five years after the enactment of Part II. Congress must be deemed to have known in 1940 that the courts had held that the language employed in Part I had precisely the meaning of the language employed in Part II. Congress then had a choice of two methods of expressing the same intention; therefore, no significance can be given to the fact that, when it enacted

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[8] Italics added.

Part III in 1940, it selected the language which it had used in Part II.[9]

Plaintiff places much reliance on *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. There this very plaintiff was subject to a tax imposed by a statute of the State of New York, for the privilege of doing business as a corporation, equal to a percentage of the gross earnings on transportation originating and terminating in that State; the statute expressly provided that the tax would not apply to earnings derived from interstate business. The State assessed the tax on earnings from towage between New York ports which passed through New Jersey waters. Plaintiff in that case contended that such traffic was interstate and not constitutionally taxable by the State, but the Supreme Court held otherwise. There is substantially no difference between the way traffic is now handled by plaintiff and the way it was then handled as described in that opinion. Accordingly, plaintiff argues that it has been held that it is not engaged in interstate commerce, and is therefore not subject to the Commission's jurisdiction. In so far as this is a contention that Congress lacks the power constitutionally to regulate plaintiff under the Commerce clause, the contention must fail. Criteria employed in determining whether a state may validly tax because of the Commerce clause are not applicable to a determination whether the federal government may validly regulate under that clause. The *Sohmer* case itself relies upon, and cites, *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192, and *Ewing* v. *City of Leavenworth*, 226 U. S. 464, where that distinction is clearly made. See also *Hawley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 621.

Plaintiff also suggests that the Sohmer decision is a finding of fact, conclusive for all purposes, that it is engaged in intrastate commerce. The answer is that the "finding" was there made with reference to the power of the State

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[9] These comments also answer a possible suggestion based upon the definition of "interstate commerce", similar to that used in Part II, in § 402(a) (6) of Part IV, that Part having been enacted in 1942, two years after the enactment of Part III.

to tax. In the instant case, the Commission, after a hearing, has made an express finding that plaintiff is engaged in interstate transportation as that term is defined in Part III.[10]

Pursuant to F. R. C. P. 52, we are filing herewith our findings of fact and our separate conclusions of law; as provided in that Rule, we will entertain a motion by either party that we amend the findings or make additional findings.

Dismissed.

JEROME N. FRANK,
U. S. C. J.
ALFRED C. COXE,
U. S. D. J.
JOHN BRIGHT,
U. S. D. J.

APPENDIX "B".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civ. 21-35.

CORNELL STEAMBOAT COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant.*

The following are our findings of fact and separate conclusions of law made pursuant to F. R. C. P. 52:

Findings of Fact.

1. Plaintiff filed an application with the Interstate Commerce Commission asking for a certificate as a contract carrier by water under § 309(f) of Part III of the Interstate Commerce Act or for such certificate as it might be entitled

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[10] The Commission urged that we apply the doctrine of such cases as *Gray* v. *Powell*, 314 U. S. 402, 413, as to the weight to be given to administrative interpretations of the statute. We have found it unnecessary to do so. Cf. *Hartford Electric Light Company* v. *F. P. C.*, 131 F. (2d) 953, 966 (C. C. A. 2).

to procure, and, simultaneously, petitioned the Commission to dismiss its application for lack of jurisdiction over plaintiff. A hearing was duly held at which evidence was taken before a Commission Examiner; on exception to the Examiner's proposed report, Division 4 of the Commission, after argument, made findings of fact and an order. On reargument before the full Commission, it approved the findings and order of Division 4 with a slight modification.

2. The Commission found that plaintiff had held itself out as a common carrier by water for compensation, as that term is defined in the Act, in the performance of towage of non-self-propelled vessels "between points within New York Harbor, New York, and New Jersey * * * and Waterford, New York, and intermediate points on the Hudson River," and that it had performed such services on January 1, 1940, and continuously since then.

3. There was substantial evidence before the Commission to sustain those findings.

4. The Commission denied plaintiff's motion to dismiss its application and order that a certificate of convenience and necessity issue to plaintiff as a common carrier by water in accordance with those findings and pursuant to § 309(a) of the Act.

5. The evidence presented to this court on the hearing of this case consisted solely of plaintiff's application and petition before the Commission; the evidence considered by the Commission; a proposed report made by a Commission Examiner who heard the evidence; the opinion, findings and order of Division 4 of the Commission; and the opinion, findings and order of the full Commission.

6. The undisputed evidence is that, while 95% of plaintiff's services here consisted of towing, through the Hudson River, from points of departure in New York State to points of destination in that State, yet most of its tows crossed into New Jersey waters for some seven or eight miles and were obliged to do so because, for that distance, the navigable channel of the Hudson River lies west of the New York-New Jersey boundary line; and that something

less than 5% of plaintiff's business consisted of towing between points in New Jersey adjacent to the Hudson River or New York Harbor and points outside the harbor in New York State.

Conclusions of Law.

1. The findings of fact made by the Commission are not erroneous.

2. Within the meaning of Part III of the Act, plaintiff is engaged in transportation "wholly by water from a place in a state to a place in another state."

3. The order of the Commission is supported by its findings and is not erroneous.

4. The statute, so far as made applicable to the plaintiff by the order of the Commission, is not violative of any part of the Constitution of the United States.

JEROME N. FRANK,
U. S. C. J.
ALFRED C. COXE,
U. S. D. J.
JOHN BRIGHT,
U. S. D. J.

Dated: New York, N. Y.
July 7, 1943.

APPENDIX C.

INTERSTATE COMMERCE COMMISSION.

No. W-359.

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION.

Submitted October 21, 1942. Decided February 2, 1943.

Upon reargument, findings in prior report, 250 I. C. C. 301, that applicant is entitled to continue operation as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, within the limits of New York Harbor, N. Y. and N. J., on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since, and that applicant's petition for dismissal of its application should be denied, modified. Corrected certificate issued.

Appearances as in prior report, and *Christopher E. Heckman* for intervener.

REPORT OF THE COMMISSION ON REARGUMENT.

BY THE COMMISSION:

In the prior report, 250 I. C. C. 301, division 4 found that applicant was entitled to continue operation as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels within the limits of New York Harbor, N. Y. and N. J., and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since, and it issued a certificate of public convenience and necessity. The application was in form a petition for a permit under the provisions of section 309(f) of the Interstate Commerce Act authorizing continuance of opera-

tion as a contract carrier by water, but it further prayed that if the facts show that applicant, although applying for a permit, is entitled to a certificate, the application be considered as one of the appropriate form of authority. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the act. On the same date applicant filed a petition to dismiss its application on the ground that, in the performance of its business of furnishing towage services, it does not engage in or perform or furnish any transportation of passengers or property within the language and intent of the provisions of part III of the act, and therefore is not subject to and does not come under the regulations of the act. Without prejudice to its request for dismissal upon those grounds, applicant further prayed that it be held exempt from and not subject to regulation insofar as its towage services are furnished wholly intrastate, to, from, and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered are engagd in, or any cargoes or property on board those vessels are moving in, interstate commerce. Division 4 denied this petition. Upon petition of applicant, we reopened the proceeding for reargument, and postponed the effective date of the certificate and order to March 24, 1943. At the reargument applicant filed a supplemental brief. The facts are fully set forth in the prior report, and will be repeated here only to the extent necessary to an understanding of the matters herein discussed.

The same three questions are presented on the reargument as in the prior report: (a) Are towers to be regulated as carriers under part III of the act? (b) Is transportation by water between two ports in a single State but passing through the waters of another state, within the jurisdiction conferred on this Commission by part III of the act? And (c) is applicant a contract carrier or a common carrier? These will be considered in the order stated.

Briefly stated, applicant's main contention is that towers who furnish towage services without assuming contractual obligations and liabilities as to the cargoes upon the

vessels towed have for years been held by the courts not to be common carriers; and that therefore when Congress undertook by part III of the Interstate Commerce Act to regulate common carriers by water it must not be understood to have undertaken to regulate such towers. It is pointed out that under this form of towage the barge owners retain possession and custody of the merchandise upon the barges, through their barge captains who accompany the barges.

Each of the cases in the line of court decisions relied upon involved a defense under section 3 of the Harter Act (46 U. S. C. 192), which provides:

> If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.

Division 4 discussed representative cases. It is sufficient here to say that in those instances where the contract was for towage only of the loaded vessel, the court held that nothing in the agreement could be regarded as making the vessel or her cargo the cargo of the tug so as to make available to the tug owner the defense provided by the Harter Act. But where the contract was to transfer merchandise by means of the barges and tugs of the tug owner, there was a contract of affreightment, the tug and barge became, for the purposes of the voyage, one vessel, and the defense provided by the Harter Act was available to the tug owner. After discussing these cases, the division said:

> • • • Relating, as they do, to loss and damage, we do not accept them as determinative of the status of towers under part III of the act, which specifically provides in section 320(d) that:
>
> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of

> the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.
>
> In view of section 320(d), we consider that a finding that towers are carriers within the contemplation of part II would not affect their liability for loss or damage. Therefore the foregoing decisions may not be construed as a bar to the regulation of towers under part III.

Division 4 also discussed at length applicant's numerous contentions, the facts, and the law respecting the definition of a common carrier by water under part III, what constitutes carriage or transportation under that part, the various paragraphs of the Interstate Commerce Act which might throw light on the intention of Congress with respect to the question here under consideration, and the broad purposes of part III. In fact, every contention raised by applicant on reargument and in its supplemental brief as to whether or not towers are brought within the scope of part III was fully discussed in the prior report. We concur in the conclusions of the division for the reasons set forth by it at length, and it would serve no useful purpose to repeat that reasoning herein. The finding that towers engaged in interstate towing for the general public are subject to part III of the act, except to the extent that specific exemptions are provided, is affirmed.

Coming next to the question of whether transportation by water between two points in the same State, but passing through another State enroute, is within the jurisdiction conferred on this Commission by part III of the act: Division 4 discussed the various provisions of the act bearing upon this question, and illustrated the incongruous results that would follow the acceptance of applicant's contention that transportation of the character here considered is not made subject to our jurisdiction under part III.

In support of its contention that transportation between two ports in New York, but passing enroute through New

Jersey, is not interstate commerce within the jurisdiction conferred on this Commission by part III of the act, applicant relies upon *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. That case involved a statute of the State of New York imposing a tax upon transportation corporations for the privilege of carrying on business in a corporate capacity within the State, equal to five-tenths of 1 percent of the gross earnings on transportation originating and terminating in the State of New York. The statute expressly provided that the tax would not apply on earnings derived from interstate business. The State assessed the tax on earnings from transportation between New York ports but which passed through New Jersey waters, which traffic this applicant there contended was interstate and so not taxable by the State of New York. It was stated by applicant's counsel at the reargument herein that there is substantially no difference in the way the traffic is handled now and the way it was handled then as described in that opinion; and the facts of record, recited in the report of division 4, tend to support that conclusion. The traffic was described in the opinion of the Court in the following language:

> Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken out to the stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river is in the territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn. Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is

> included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State.

The court held that the tax was not a charge upon the navigation of the river, but was upon the doing of business as a corporation of the State within the State. In the course of its opinion the court said:

> Transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State. *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192; *Ewing* v. *City of Leavenworth*, 226 U. S. 464.
>
> * * *
>
> We are of the opinion that commerce thus carried on is not interstate commerce, beyond the taxing power of the State, and that the return on which the tax was assessed did not involve the revenues of commerce among the States.

It will be seen that the court indicated that it was following *Ewing* v. *Leavenworth*, 226 U. S. 464. That case involved the constitutionality of a license tax on express companies for receiving and sending packages between points within the State of Kansas, levied by the city of Leavenworth, Kans. The route of the express company from Leavenworth passed over into the State of Missouri, and thence back into Kansas. The contention was therefore made that the tax was a regulation of and burden upon interstate commerce. The court said that the case was controlled by *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192, and distinguished the taxing power from the power of regulation of transportation. We quote:

> It is contended, however, that the contrary result must be reached, applying the principles laid down in *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. In that case this court declared unconstitutional a law of Arkansas undertaking to fix rates upon rail-

way transportation, the transportation in question in that case being a single carriage partly outside of the State of Arkansas from a point within to another point within the State. In the particular instance the transportation covered 116 miles, of which only 52 miles were within Arkansas and the rest without the State. It was held that the right to regulate such commerce was solely in Congress under the Constitution, and that the transportation was a single and entire thing and as a subject for rate legislation was indivisible. The case of *Lehigh Valley Railroad* v. *Pennsylvania, supra,* was called to the attention of the court, and of that case this court said (p. 621):

"That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, *the intimation was carefully confined to those purposes.* Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' 145 U. S. 201. *Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. Maine* v. *Grand Trunk Railway Co.,* 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

The distinction is applicable here. There is no attempt to fix a rate by the authority of the State, which, while single and complete in itself, covers for a considerable part interstate transportation. The privilege tax levied in this case expressly excludes commerce of an interstate character or business done for the Government, and is levied solely on the business done in the City of Leavenworth in receiving packages from points within the State and in transporting packages to like points. Applying the principles of the *Lehigh Valley Case* to such a situation

> we are of opinion that, *for the purpose of a privilege tax for business thus done*, the municipality, acting under authority of the State, did not exceed its just power. (Emphasis added.)

We conclude that the right of the State of New York to impose a franchise tax based in part upon revenues from business between two ports of that State but which passes through the State of New Jersey, is clearly distinguished from, and constitutes no bar to, the exercise of jurisdiction by this Commission to regulate such interstate transportation.

At the reargument, and in its supplemental brief filed at that time, applicant, while admitting that the geographical boundary between New Jersey and New York follows the middle of the river (4 Stat. L. 708), urges that the State of New York has jurisdiction over the waters of the Hudson River lying west of Manhattan Island to the low-water mark on the New Jersey shore, under an agreement entered into by the two States in 1833. That agreement was ratified by the legislatures of the two States and approved by Congress. It fixes the boundary at the middle of the river and bay, but grants to the State of New York exclusive jurisdiction over all the waters of the Bay of New York and of the Hudson River lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil Creek to low-water mark on the New Jersey side thereof, subject to certain specified rights of property and of jurisdiction of the State of New Jersey, one of which is the exclusive right of property in and to land under the water lying west of the middle of the bay and river; a second is that the State of New Jersey shall have exclusive jurisdiction over wharves, docks, and improvements on the shore of that State, and over all vessels aground or fastened to any wharf or dock on that shore, except that said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New York; and another is the regulating of fisheries west of the middle of said waters. This agreement is referred to, and its provisions are set forth in *The People* v. *Central R. Co. of N. J.*,

42 N. Y. 283. The court there, referring to the second exception, said:

> This exception explains the object and nature of the jurisdiction intended to be given to New York. It was to be a police jurisdiction of and over all vessels, ships, boats or craft of every kind that did or might float upon the surface of said waters, and over all the elements and agents or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and to secure the observance of all the rules and regulations for the protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York, and preserve thereupon the public peace.

Respecting the asserted jurisdiction of the State of New York to decide what is an obstruction upon those waters, the court said:

> The jurisdiction asserted for this State really belongs to the general government. In the case of the *State of Pennsylvania* v. *The Wheeling Bridge Company and others* (13 How. U. S. 579) Chief Justice Taney said: "The Ohio being a public navigable stream, congress has undoubtedly the power to regulate commerce upon it."

From the north end of Manhattan Island northward to the point where the northern boundary of New Jersey reaches the Hudson River is some 7 or 8 miles. Applicant therefore asserts that only for this distance would its traffic be outside the waters that are under the jurisdiction of the State of New York. It is not necessary for us to pass upon the question of whether the movement of applicant's traffic through the waters of the western half of the Hudson River lying west of Manhattan Island constitutes it interstate commerce, although this applicant in *Cornell Steamboat Co.* v. *Sohmer, supra,* contended that it was such, since concededly movement through the waters of the western half of

the river north of Manhattan Island is through waters under the jurisdiction of the State of New Jersey. The interstate character of applicant's traffic is determined, not by the number of miles that it moves outside the State of New York, but by the fact that it *does* move outside the State.

The finding and certificate of division 4 embrace transportation within the limits of New York Harbor. It is clear that as to towage performed by applicant wholly within New York Harbor applicant is not a party to any arrangement for the through carriage of such barges or the cargoes therein from or to points without the State. In section 303(g) of the act it is provided that the provisions of part III shall not apply to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors. Applicant therefore requires no certificate for such transportation as it performs entirely within New York Harbor, and the certificate will be corrected accordingly.

We affirm the conclusion of division 4 that transportation between two points in the State of New York, passing through New Jersey territorial waters en route, is within the jurisdiction conferred on this Commission by part III of the act.

Coming finally to the question of whether applicant is a contract carrier or a common carrier: Division 4 recited at length the facts bearing upon this question, even going to the length of quoting some of the testimony. The evidence, as recited by the division, warrants the ultimate finding of fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service, and the conclusion that such a holding out, accompanied by performance, constitutes one a common carrier.

The division set forth six numbered paragraphs of findings of fact, which we find to be fully supported by the evidence. We adopt those findings as our own and they

are by reference made a part of this report. Upon those facts we affirm the conclusion of the division that applicant was in bona fide operation on January 1, 1940, in interstate commerce as a common carrier by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our order of March 26, 1941, entered in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River; that such operation has been continued since that date; and that applicant is entitled under the "grandfather" clause of section 309(a) of the act to a certificate of public convenience and necessity authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicant's operations, the requirements of part III of the act, and the orders, rules, and regulations of the Commission thereunder.

We further affirm the division's denial of applicant's petition to dismiss the application.

A corrected certificate and order will be issued.

JOHNSON, *Commissioner*, concurring in part:

Generally speaking, the Hudson River forms the boundary between New York and New Jersey. The geographical boundary follows the middle of the river, but under an agreement entered into between the two States New York is granted police jurisdiction to the low-water mark on the New Jersey side. Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey, but such tows originate in New York and are destined to points in New York; they merely pass through the territorial waters of New Jersey. With respect to the transportation performed by this applicant, the Supreme Court has held that "Transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State." *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. For commercial

purposes the entire river may be considered the boundary line between the two States. I am, therefore, of the opinion that the transportation here involved is not interstate for the purposes of regulation under the Water Carrier Act.

I am authorized to state that COMMISSIONER LEE joins in this expression.

SPLAWN, *Commissioner*, dissenting:

Applicant has been engaged in the towage business for many years, operating between points in New York and New Jersey within New York Harbor and between New York and points on the Hudson River. Applicant enters into individual contracts in connection with each towage operation. Its charges depend upon the weight of the tow and also whether other ships are towed at the same time. The charges have no relation to the lading on the towed ship and applicant undertakes no responsibility with respect to loss or damage of the towed ship or cargo. Applicant does not hold itself out to transport any commodities or property, but is willing to enter into contracts with any person or persons desiring its services within the area of its operations.

Although it has filed this application for authority under part III of the Interstate Commerce Act, applicant denies that we have jurisdiction over its operations. It is conceded that applicant's towboats constitute transportation facilities within the meaning of section 302(h) of part III, but it is denied that applicant is a common carrier by water within the meaning of section 302(d). We have found only carriers by water are subject to regulation under part III even though transportation facilities may be furnished by other persons. See *Status of Wharfingers*, 251 I. C. C. 613.

Prior to the enactment of part III, the common law was to the effect that companies engaged in the business of towage were not carriers or charged with the liabilities or entitled to the benefits of laws pertaining to carriers. The reason was that such companies did not enter into contracts of affreightment, but merely agreed to perform

specific towage operations. Where, however, the tower also controlled the towed ship containing the lading and entered into contracts with respect thereto, the two ships, one furnishing the motive power, the other the support for the lading, constituted a vessel within the meaning of the Harter Act, relieving carriers from liability for loss or damage when proper equipment had been furnished. *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 331. The protection of this statute ran to "any vessel transporting merchandise or property" and the tug and barge combined were held to constitute such a vessel. The findings in the report do not bring applicant within this special class of towers controlling the towed ships.

Another exception is illustrated by operators of towboats towing logs in Puget Sound and adjacent waters. In *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211, it was held, "In all essential particulars, that service is like the carriage of freight in vessels." With these exceptions, the law has not regarded operators of towboats to be carriers.

There is nothing in part III to support the conclusion that Congress intended to change the common law with respect to towboats. The only reference to towage is in section 303(f) which exempts any towage performed for carriers and requires that regulation be through the respective rail, motor, or water carrier, as the case may be. This provision furnishes no basis for the conclusion that Congress intended that towboats, as such, not engaging in the transportation of commodities or entering into contracts of affreightment, should be held to be carriers subject to regulation. The undertaking of applicant herein is to render specific services and not to transport goods or property. In the absence of any clear language in the statute declaring towboats to be carriers, and the doubtful constitutionality of such a declaration or construction, I would find that the common law rule still prevails, and that ordinary towage, such as performed by applicant, is not transportation or carriage, subject to part III.

Likewise it seems to me that applicant is not subject to regulation under part III because it is not engaged in interstate commerce as defined therein. It is conceded that its

operations within New York Harbor are exempt under our order of March 26, 1941, in Ex Parte No. 140. The only color of jurisdiction lies in the fact that the transportation between points in New York at times probably crosses the thread of the stream and is thus within the jurisdiction of the State of New Jersey. Section 302(i)(1) defines interstate transportation for the purposes of part III as being "wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Under this definition transportation between two points in the State of Washington would not be in interstate commerce if the vessel had to pass through Canadian waters. No reason appears for giving any broader construction to this section if the vessel happens to pass through the waters of any other State.

The conclusion in the report rests almost entirely upon the alleged similarity with the provisions of part I. This analogy is unsound because the exact routes of water carriers are indefinite as compared with railroads, particularly where the waterway constitutes a boundary, and because part I was not the result of a single enactment but rather the consequence of many statutes and much interpretation. In the enactment of parts II and IV, the Congress for the purposes of those parts, has specifically included within the definition of interstate commerce, transportation between points within the same State through another State. The failure to include a similar provision in part III can mean only that Congress intentionally limited jurisdiction to transportation between points in different States. This construction is also consistent with the fact that part III contains numerous exceptions and exemptions which are evidence of the Congressional intent to confer more limited jurisdiction than has been given in the other parts of the act.

For the reasons given above, I think that the application should be dismissed for lack of jurisdiction.

PATTERSON, *Commissioner*, dissenting:

The majority finds that applicant, when towing non-self-propelled freight-carrying vessels for the general public,

is a common carrier of said vessels. Many of these vessels are loaded but there is no finding that applicant is a common carrier of the commodities with which they are loaded. The theory of the majority appears to be that there is a relation of common carrier and shipper so far as the vessels are concerned, but not as to the cargo on the vessels. Under the finding applicant will have to publish rates for towing vessels but not rates for the transportation of the numerous commodities on the vessels. A vessel, like a freight car, is a facility used to transport goods. It seems to me anomalous to hold that one is a common carrier of the facility and not to find that it is a common carrier of the goods therein.

It seems clear that prior to the enactment of part III of the act, an independent tower operating as does applicant was not considered a carrier under the law. Applicant's tugs are merely motive power used for the same purpose as horses or tractors might be used, and nothing more. Whether the motive power is attached to the vessel or operated as a separate unit is immaterial. I believe that Congress did not intend to and did not bring such towers under our jurisdiction. I also believe that if applicant were a common carrier under part III, it would be a common carrier of the goods on the vessels which it tows.

APPENDIX "D".

Certificate and Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of February, A. D. 1943.

No. W-359.

Cornell Steamboat Company—Contract Carrier Application

It appearing, That on June 15, 1942, division 4 made and filed its report and issued its certificate and order in the above-entitled proceeding, and that on August 10, 1942,

the Commission, by appropriate order, reopened this proceeding for reargument;

It further appearing, That this proceeding has been reargued, and that the Commission, on the date hereof, has made and filed its report on reargument containing its further findings of fact and conclusions thereon, which said report on reargument and the aforesaid report of June 15, 1942, are hereby referred to and made parts hereof:

It is hereby certified, That the public convenience and necessity require the continuance of operation by Cornell Steamboat Company as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, in interstate or foreign commerce, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our order of March 26, 1941, in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the petition of applicant to dismiss the application be, and it is hereby, denied.

It is further ordered, That the aforesaid certificate and order of June 15, 1942, as subsequently postponed, to March 24, 1943, be, and it is hereby, vacated and set aside.

And it is further ordered, That this certificate and order, dated February 2, 1943, shall take effect and be in force from and after May 11, 1943.

By the Commission.

[SEAL.]

W. P. BARTEL,
Secretary.

APPENDIX "E".

INTERSTATE COMMERCE COMMISSION.

No. W-359.

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION.

Submitted March 12, 1942. Decided June 15, 1942.

1. Applicant found entitled to continue operation as a common carrier by water of non-self propelled freight-carrying vessels by means of towing vessels within the limits of New York Harbor, N. Y. and N. J., and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since. Certificate of public convenience and necessity issued.

2. Applicant's petition to dismiss its application denied.

Robert S. Erskine, for applicant.

Stanley Carpenter, Reginald G. Narello, James A. Martin, Maurice A. Krisel, Richard H. Specker, Harry C. Ames, Alfred S. Knowlton and *Seymour P. Egerton* for intervenors.

Report of the Commission.

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE AND MILLER

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by applicant and certain of the intervenors, and the issues were orally argued. Our conclusions differ from those recommended by the examiner.

By application filed May 21, 1941, Cornell Steamboat Company, a New York corporation, with its principal office at Kingston, N. Y., seeks a permit under the provisions of section 309(f) of the Interstate Commerce Act authorizing

continuance of operation as a contract carrier by water in interstate or foreign commerce, in furnishing under individual contracts or agreements the services of its fleet of tugboats in towing barges, scows, and similar vessels carrying cargoes either below or on deck, from and to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., harbor points located in New York or New Jersey on the waters of the lower Hudson, and the adjacent waters of New York Harbor. The petition further prays that if the facts show that applicant, although applying for a permit, is entitled to a certificate, the application be considered one for the appropriate form of authority. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the act.

On May 21, 1941, applicant filed a petition to dismiss its application on the grounds that, in the performance of its business of furnishing towage services as above described, it does not engage in or perform or furnish any transportation of passengers or property within the language and intent of the provisions of part III of the act, and, therefore, is not subject to and does not come under the regulations of the act. Without prejudice to its request for dismissal on those grounds, applicant further prays that it be held exempt from and not subject to regulation insofar as its towage services are furnished wholly intrastate to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce.

Rail carriers in official territory and the Northeastern Inland Waterways Association, Incorporated, intervened at the hearing, but introduced no evidence. The Atlantic Coastwise and Inland Water Carriers Association, Incorporated, and Mississippi Valley Barge Line Company were permitted to intervene for the purpose of filing exceptions, and the Boston Towboat Company for the purpose of participating in oral argument. Most of the interveners con-

tend that applicant should be regulated as a common carrier, although differing as to whether services rendered other water carriers should be exempt from regulation.

Applicant was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president, who has held that position for the past 29 years. From its inception the business of the applicant has been and still is completely owned by succeeding generations of the same family. At the time of the hearing applicant owned and operated a fleet of upwards of 33 tugboats of undisclosed power and size, some of which are powered by steam and others by diesel engines. One scow is maintained in connection with its regular equipment, but applicant does not own or operate any barges or other type of carrying craft. No cargoes of merchandise or passengers are carried on any of the tugboats. The tugboats are used exclusively in towing for applicant's customers, over 70 percent of whom are shippers who own or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers.

Applicant renders towing services the year around within the limits of New York Harbor, and harbors contiguous thereto, as those limits were defined by us in our order of March 26, 1941, entered in Ex Parte No. 140. It also renders towing services on the Hudson River up as far as Waterford, N. Y., above Troy, N. Y., and the entrance to the Erie Canal, but those operations are suspended during the season when ice prevents them, which is generally from the early part of December to about the middle of March.

Applicant has on file with the Commission its schedule I. C. C. No. 2, containing its minimum rates and charges for the performance, as a contract tower, or only such towage services as it may see fit to undertake under private contract on the Hudson River between Troy, N. Y., and New York Harbor, and intermediate points.

Applicant's records for the year 1940, which it considers fairly representative of its annual business for the past 10 years, shows that only 4.4 percent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River and points outside the harbor in New York State. However, much of the transportation between

up-river points and harbor points in New York must be interstate commerce, as the New York-New Jersey boundary follows the middle of the river, 4 Stat. L. 708, and would be crossed in the ordinary course of navigating large flotillas of barges up or down the river.

By far the largest part of applicant's business is done on time contracts entered into for a period of years, while some contracts run for a single year, and the balance consists of miscellaneous contracts arranged from day to day. From 12 to 13 percent of its business is of the latter type. Arrangements for all of its towing services, whether for a period of time or for an individual operation, are based on separate agreements or contracts. The vessels towed are scows which carry their cargoes on deck and barges which carry the cargoes below deck in the hold. Under the form of contract used, the shipper does not agree to make shipments; but if it does make shipments, it agrees to employ the towage services of applicant, and to pay therefor at the rates stated in the contract, which are based upon the capacities of the barges described therein. If reductions are made by applicant in the rates charged other shippers for like service, the contract rates are to be reduced to the same level; and if applicant's fuel or labor costs are increased due to strikes or other causes beyond applicant's control, the contract charges are to be increased provided the increases are also made effective as to other customers for similar services. Barges are not deemed to be in applicant's custody or under its responsibility while lying at docks or not being actually towed. The term of the contract is stated, and provision is made for its continuance from year to year if not canceled at the end of the year. Such a contract, prior to the requirement of law for the publication of tariffs, served the same purpose as a common carrier published tariff, which fixes rates and conditions for future acceptance. In addition it reserved to applicant the sole right to tow such traffic covered by the contract as the shipper might decide to move by barge.

The charges for towing services have no relation to, and no connection with, the freight charges paid by the owners of the cargoes for their transportation. Applicant's only interest in a cargo is with respect to the size

of the scow or barge on which it is loaded, and the weight of the cargo which controls the load-water draft of the barge. Rates charged for towing are lower for the larger units. For example, the rate per ton for towing a barge with a minimum of 1,500 tons is less than the rate per ton for a 300-ton-minimum barge. The rate is also lower if the scow or barge is towed with others in a flotilla. Applicant maintains a schedule for its customers under which a tow leaves New York Harbor daily for points as far north as Poughkeepsie, N. Y., and every other day for Albany, N. Y., and other points on the upper Hudson. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. In flotilla towing the rates are the same to all customers for equal tonnages. If a customer desires individual service the rate is necessarily higher. From 85 to 90 percent of applicant's business is in those flotillas. The flotilla may consist of from 5 to 50 barges. Applicant has practically no limit on such flotillas, but takes all that is offered and adds such additional tugs as may be required.

No holding out of any offer of towing services is advertised by applicant in any daily papers or trade journals. Its witness thought that a simple announcement of towing services had been carried in Bullinger's Guide for many years. An examination of the 1939, 1940 and 1941 editions of that guide fails to disclose such an announcement. Its business has been built up with individual customers over the many years of its operation, and, as the witness said, "The business has been going on for so long that everybody knows it". Applicant has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, unsatisfactory credit, and when the requested service could not be rendered without injuring one of the regular customers. How such injury could result is not explained, and, in view of the evidence that there is practically no limit to the number of barges it can include in a flotilla, the statement is unintelligible. It also frequently declines to perform tow-

age unless it is given a release from all liability, including liability for negligence.

Applicant does not issue bills of lading or similar documents with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the tugboat nor any other employee of applicant has anything to do with the cargoes on the vessels in the tow. Applicant generally has no interest in and no "official knowledge" of the origin or final destination of the cargoes, and when the towing service is complete with the docking of the vessel at the place agreed upon, no further services are rendered. No arrangements for any through movement, of which the towing services might be a part, are ever entered into by applicant with any other carrier. Applicant claims a lien on the barges towed for its towing charges, but no lien on the cargoes. When the barge is a chartered one, applicant relies on the credit of the charterer.

Are Towers to Be Regulated as Carriers?

The first and fundamental issue raised is whether persons engaged, as is the applicant, only in towing for others by non-carrying vessels are to be regulated as carriers under part III of the act.

In its brief applicant contends that its petition should be granted and its application should be dismissed, for the following reasons:

> The petitioner is not a carrier, and is not "engaged in the business of a contract carrier by water."
>
> No authority is vested in the Commission by part III of the act, and more particularly section 309(f) to issue a permit to, or to require that a permit be held by, any person who is *not* "engaged in the business of a contract carrier by water."
>
> The legislative history of the act and the language of the act itself indicate plainly that Congress did not include towers, such as the petitioner, in the cate-

gory of the water *carriers* which Congress intended to regulate.

In the absence of any specified provision of the act to bring towers, such as the petitioner, within the category of water *carriers*, it can not be assumed that Congress intended to change the long established law of the land that such a tower is not a carrier, or that Congress intended to include such a tower when it authorized the Commission to regulate *carriers* by water.

In support of its contention that it is not a carrier, applicant relies upon the following court decisions and the statements therein which are first set forth. This is followed by our own comments.

In *Stevens* v. *The White City*, 285 U. S. 195, 200, the court said that under a towage contract the tug is not a bailee of the vessel in tow or its cargo; that it does not have such control of the tow as belongs to common carriers and other bailees; that the vessel in tow, its cargo and crew, remain under the authority of its master, and in emergency the duty is on him to determine what shall be done for the safety of his vessel and her cargo; and that a contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment. This case was an action for damages against a tug for injury to her tow.

In *Wells* v. *The Steam Navigation Co.*, 2 N. Y. 204, 208, the court said that it was a misnomer to call defendants common carriers, or carriers of any kind in relation to the business of towing boats; nor were they bailees, for the property towed is not delivered to them, nor placed within their respective custody or control, but remains in the possession, and for most purposes in the exclusive care of the owners or their servants. This, too, was an action for damages against a steamboat for injury to her tow. The court held that the tower might lawfully contract for a more restricted liability than would be implied against it in the absence of a special contract.

Distinguishing its decision in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 331, from two earlier cases, the court

said therein, "The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved." After referring thereto, applicant goes on to say that section 3 of the Harter Act (46 U. S. C., Sec. 192) gave certain defenses on certain conditions to the owner of "any vessel transporting merchandise or property"; and such defenses were not available to tug owners in performing contracts of towage because their tugs were not transporting or carrying anything. In that case the owner of a barge and a steamer used to tow the barge issued a bill of lading for a cargo loaded on the barge, and through negligence of the towing steamer the barge was sunk and the cargo lost. The sole issue was whether the barge alone or the combination of tug and barge was the "vessel transporting" the cargo, within the meaning of the Harter Act. The Court held that in such case the barge and tug together constitute the vessel transporting merchandise or property within the meaning of that act. The Court there said:

> Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been futile as a contract for the use of freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end.
>
> It is said that the Harter Act is to be strictly construed. *The Main* v. *William*, 152 U. S. 122, 132. Even so, the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two mean-

ings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent. * * *

In *The Columbia, supra,* 73 Fed. 226, it was held that a barge having no motive power and a tug belonging to the same owner and furnishing the motive power constituted one vessel for the purposes of the voyage. In that case, wheat was to be transported by means of the barge, and the owner of the barge and tug undertook the transportation. The court said (p. 237): "As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. * * * When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage,—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines." It was, accordingly, held that without surrendering both vessels, the owner was not entitled to the advantages of Revised Statutes Sec. 4283 *et seq.,* providing for a limitation of liability of "the owner of any vessel," etc.

The Harter Act was again construed in *The Murrell,* 200 Fed. 826, and applicant relies upon the statement of the court, page 829, that, to say the owner of the tug was "engaged in transporting merchandise or property" where the tug and tow belong to distinct owners having with each other only the relations arising under an ordinary contract for safe towage, would be to extend the words of that act so as to make them include what Congress never intended them to include; that there is nothing in the agreement of the owner of a tug to tow another owner's vessel which can be regarded as making the latter vessel or her cargo the cargo of the tug. That, too, was an action for damages to the tow. While the barge there was under charter to the tow, the court said that to regard tug and barge as one vessel in that case and thus bring it under the Harter Act would be to permit petitioner to treat both vessels as one

in a proceeding instituted by him on the theory that they are distinct and independent.

In *Bradley* v. *Lehigh Valley R. Co.*, 145 Fed. 569, 573, the court distinguished that case, where the relation of the tug was one of towage, from *The Nettie Quill*, 124 Fed. 667, where a locomotive carried on a barge towed by that steamer was dumped overboard, in which case a bill of lading had been issued by the steamer, resulting in a contract of affreightment rather than towage.

Applicant further contends that there are none of the distinctive features of carriage in its business; that it does not carry anything, does not contract nor have possession of cargoes or passengers, has no connection with any contract of carriage, has none of the responsibilities of a carrier, is not engaged in the business of a carrier, and that therefore it is not a carrier. It says that it has been a litigant in numerous matters in the Federal courts, but in none of those cases has it or its tugs been held to liability as a carrier.

It will be seen that all the foregoing decisions involved claims for damages to the tow or its cargo, and all held in effect that the owners of towboats, when engaged only in towing vessels belonging to others and not under contracts of affreightment, were not carriers. Relating, as they do, to loss and damage, we do not accept them as determinative of the status of towers under part III of the act, which specifically provides in section 320(d) that:—

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

In view of section 320(d), we consider that a finding that towers are carriers within the contemplations of part III would not affect their liability for loss or damage. Therefore the foregoing decisions may not be construed as a bar to the regulation of towers under part III.

Applicant asserts that part III does not authorize nor contemplate that a permit be issued to or held by anyone but a carrier, and that the history and plain language of part III do not justify the view that Congress intended to authorize the Commission to regulate anyone other than a carrier. In support thereof it relies upon the repeated use of the term "carrier" throughout part III, and cites the use of the same term in the Congressional Record when part III as a bill was under consideration in Congress. It contends that a carrier is one who carries, and that "carry" is defined as "to convey or transport while supporting." As it does not furnish the vessel which supports the freight transported in its tows, applicant concludes that it is not a carrier. But the Circuit Court of Appeals, Seventh Circuit, in *Belt Ry. Co. of Chicago v. United States*, 168 Fed. 542 (dismissed on certiorari, 223 U. S. 743), found the Belt Railway Company of Chicago to be a common carrier in the service of transferring the cars of trunk lines from the tracks of one trunk line to the tracks of another within the terminal area, by means of its locomotives, although it did not furnish the cars, and had no dealings with the shippers.

Towage, as such, is specifically mentioned in part III only twice. Section 303, dealing with exemptions, in par. (f) provides that the provisions of this part shall not apply (1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II incidental to transportation subject to such parts, in the performances of floatage, car ferry, lighterage or towage, but such transportation shall be subject to part I or part II; and (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad, or an express company, subject to part I, a motor carrier subject to part II, or a water carrier subject to part III, in the performance of floatage, car ferry, lighterage, or towage; but that such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

Clearly, applicant's operations are not those described in section 303(f)(1); and they are not those described in section 303(f)(2) except to the extent that it performs them for another carrier which is subject to parts I, II or III; and to the extent that its operations were performed for such other carriers (whether as agent or under a contractual arrangement) it acquired no "grandfather" rights. This section of the act discloses no intention to exempt any towage whatever from regulation, but insures the regulation of certain described towage in connection with regulation of the carrier in whose interest it is performed. If any inference whatever as to towage not described therein is to be drawn from this section, that inference is the purpose of the Congress to regulate, not to exempt from regulation.

Part III, section 302, Definitions, provides, par. (c), that, as used therein, the term "water carrier" means a common or a contract carrier by water. "Common carrier by water" as defined in par. (d) means any person which holds itself out to the general public to engage in transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, with one exception not pertinent here. "Contract carrier by water" per par. (e), means any person which, under individual contracts or agreements, engages in the transportation (other than that referred to in par. (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation. An all-inclusive definition of "transportation" is not given in this part, but it is provided (section 302(h)) that the term "transportation" includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, (omission) storage, and handling of property transported or the interchange thereof with any other agency of transportation. And "transportation facility" is defined (section 302(g)) to include any vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrument or equipment of any kind, used in or in connection with transportation by water subject to this part.

Transportation is defined in Funk and Wagnalls Standard Dictionary as "the act of transporting, or the state of being transported; conveyance; carriage of persons or commodities from one place to another"; and "transport" as "to carry or convey from one place to another. Specifically: • • • (2) *Nautical.* To haul (a vessel) about a harbor by hawsers."

A tug which engages in towing barges for a carrier subject to the act in the conduct by the latter of interstate transportation, becomes a "vessel used in or in connection with transportation by water subject to" part III. Some of applicant's business is of that nature; but what proportion, and how much thereof would be subject to regulation only as the business of the bill-of-lading carrier, is not disclosed on this record, as applicant did not make a full disclosure of its operations because of its contention that it is not a carrier.

That the furnishing of a facility in connection with interstate commerce by railroad is sufficient to constitute one a carrier subject to part I was settled in *Union Stock Yard & Transit Co.* v. *United States,* 308 U. S. 213. In that case a stockyard company which had divested itself of control of its railroad tracks, but which was engaged in loading and unloading livestock through use of its platforms and chutes, was held to be a "carrier" providing railroad "terminal facilities", and engaged in "transportation of property wholly by railroad" within part I. Clearly, to the extent that any tower furnishes facilities essential to transportation in interstate or foreign commerce which is subject to part III, it is a carrier within the meaning of that part.

Certainly a tower is engaged in transportation, in the ordinary sense of that term. It hauls vessels from place to place by hawsers. Vessels are property: therefore it conveys property from one place to another. In our opinion, "transportation", as used in part III, is to be taken in its ordinary sense, in addition to including the facilities and services specified in section 302(g) and (h). In this view of the term, a tower engages in transportation by water in interstate or foreign commerce of property or a class of property for compensation, when for compensation it tows

barges across a State line. It is therefore a carrier within the definitions of carriers in part III, and subject to the extent that its operations fall within the exemptions provided in that part.

But entirely apart from the views expressed in the next three preceding paragraphs, we think that authority to regulate towers engaged in the interstate towing of barges for compensation is within the broad purposes of part III. There is no contention but that it was intended to subject to regulation the barge in which commodities are moved in interstate commerce. Obviously an inert barge cannot move property in interstate commerce without the aid of a propelling medium. To hold that we can regulate the barge, but cannot regulate the towboat without which the barge cannot move, would be like holding that we can regulate railroad cars but not separately-owned locomotives by which the cars are moved, or can regulate automobile freight-carrying trailers but not separately-owned motors which draw them. It would nullify our authority to see that the charges against shippers are reasonable and nondiscriminatory in at least those numerous instances where the shipper provides his own barge. And it would leave unregulated one class or kind of transportation and a considerable volume of interstate commerce as to which there is, in our judgment, the same need for regulation as in the case of other classes or kinds of transportation and other interstate commerce, which are admittedly subjected to regulation.

Even the furnishing for compensation (under a charter, lease or other agreement) of a vessel, to a person other than a carrier subject to the act, to be used by the person to whom the vessel is furnished in the transportation of its own property, constitutes one a contract carrier by water; section 302(e). Since one who merely furnishes a tugboat to another for the use of the latter in the transportation of his own property is subjected to regulation, *a fortiori* would Congress intend to subject one to regulation who operates a tug for compensation in transporting barges laden with the property of the barge owner. Seventy percent of applicant's business is of the latter nature.

We conclude that part III discloses the intention of Congress to regulate towers engaged in interstate towing except to the extent that specific exemptions are provided.

Transportation By Water Between Two Points In The Same State But Passing Through Another State En Route.

Having concluded that towers are embraced within the term carriers as used in part III, we now turn to a consideration of whether transportation by water between points in a single State but passing through another State is within our jurisdiction under part III. For, as has been shown, in performing towage betwen New York Harbor and upper Hudson River points much of applicant's traffic crosses the New York-New Jersey State line. This question was not argued by applicant, because of the position it took that it is not a carrier.

Under part I of the act, jurisdiction is specifically conferred over transportation "from one State * * * to any other State." Sec. 1, (1) (c). It is further provided, Sec. 1, par. (2) (a), that the provisions of this part do not apply to transportation "wholly within one State and not shipped to or from a foreign country from or to any place in the United States."

Part II specifically confers jurisdiction over transportation "between any place in a State and any place in another State or between places in the same State through another State." Sec. 203 (a) (10).

Under part III jurisdiction is specifically conferred over transportation "from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Sec. 302 (i) (1). It is also provided, sec. 303 (k), that "nothing in this part shall authorize the Commision to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose. A like provision is contained in Part II, sec. 216(d).

It will be seen that jurisdiction over transportation between points in a State through another State is conferred in specific terms in part II, but not in parts I and III. The Commission and the courts have construed part I as conferring jurisdiction over such transportation, and this is so well established as to require no citations. Should a like construction be placed upon part III?

Examining one of the cases covering such transportation to see the reasoning followed, we turn to *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed 269. The shipment under consideration moved from New York, N. Y. to Buffalo, N. Y., through New Jersey and Pennsylvania. The court, although recognizing that the language "from one State to any other State" was susceptible of the literal interpretation that it would not include the transportation there involved, pointed out also that "at the same time it is a perfectly correct statement to say that goods shipped from New York to Buffalo on the Lackawanna road are transported from one State to another"; and expressed the view that too much weight should not be given "to a critical examination of the precise language" defining transportation subject to part I as transportation "from one State to any other State." Such transportation, said the court, cannot be efficiently regulated at all unless it is regulated by the United States. The court referred to the provision excepting transportation "wholly within one State", and reasoned that the word "wholly" imports that the provisions of the act shall apply to any transportation of property which is not wholly within one State. But it does not follow that the court would have held otherwise than it did in the absence of such a provision, when it is considered that this was a proceeding under the Elkins Act, and if the carrier was not subject to part I with respect to this transportation, it could rebate with impunity, as obviously it was not an intrastate shipment which could be regulated by the State of New York, and in the absence of Federal regulation it was not subject to regulation at all; and there could be no reasonable ground for supposing that Congress intended to produce such a result. The exception in part I as to transportation "wholly within one State" amounts to nothing more or less than a denial of any jurisdiction

over intrastate commerce as such. As above indicated, part III likewise contains a provision to the same effect only broader, namely, that this Commission shall not regulate rates for intrastate transportation for any purpose whatever; so that if the words "wholly within a State" in part I fortify the conclusion that the Commission has jurisdiction under that part over transportation between points in a single State through another State, the part III provision referred to fortifies a like conclusion as to similar transportation under part III. The reasons for holding the transportation considered in the case cited, to be subject to part I, are as cogent reasons for finding transportation of the character here considered to be subjecte to part III.

Taking one illustration: If we were to find that we cannot regulate transportation by water between two points in the same State which passes through another State enroute, we would be in the position of saying that because the origin and destination are in the same State we have no jurisdiction over through all-water shipments from Chattanooga, Tenn., on the Tennessee River, to Memphis, Tenn., on the Mississippi River, although the route extends from Tennessee through Alabama, back through Tennessee, and through Kentucky to the Ohio River, thence on the Ohio along the border between Illinois and Kentucky to Cairo, Ill., thence on the Mississippi bordering Kentucky, Missouri, Arkansas and Tennessee; but at the same time asserting jurisdiction over transportation between intermediate points on the same route where origin and destination are in different States; in other words, that we can regulate the rates for the several interstate *parts* of the transportation, but cannot regulate the rates for the *through* interstate transportation which is comprised of such parts. The through transportation would thus be left subject to no regulation whatever. *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404.

As between two interpretations, one of which would leave such water transportation as is here considered free of all regulation, and the other of which would subject such transportation to the jurisdiction of this Commission in harmony with the jurisdiction which it clearly has over similar rail

and motor transportation under parts I and II, we entertain no doubt that the latter is the correct interpretation, and we so construe part III.

Is Applicant A Contract Carrier or A Common Carrier?

We come now to a consideration of the issue whether applicant is to be regulated as a contract carrier or as a common carrier. That question must be determined by the nature of the business applicant was conducting on and since the "grandfather" date. "The character of the service, in its relation to the public, determines whether the calling is a public one." *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 220.

The fact that applicant does not assume liability as a common carrier for the freight contained in the barges towed is not conclusive that applicant is not a common carrier. In *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, quoting *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, the court said, "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests." In that case a tower of logs was held to be a common carrier, regardless of the fact that all tows were "at owner's risk." It was engaged in the general towboat business; by a tariff it gave public notice of its wilingness to transport logs, and the court found that its towboats were devoted to the public use.

Applicant's contention that all its towage has been performed either upon yearly contracts, or upon special contracts covering the individual job, is not determinative of the issue. The ordinary bill-of-lading issued by common carriers generally on every shipment transported is an individual contract covering the transportation of an individual shipment.

The test of a common carrier is whether it transports for the public generally. The evidence of record on that subject is, in part, as follows:

> Question: Within the range of your operation, with credit considerations being favorable, contents of the

barges being what you think they should be, will you tow for any one seeking your services?

Answer: We are like to, yes.

• • • • • • •

Answer: We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 percent of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed.

• • • • • • •

Answer: We have some on the blacklist, whom we do not tow, because we know that they don't pay.

• • • • • • •

Question: But if there is some boat owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet?

Answer: Surely—if he gives us an order for it before the tow starts.

Witness further testified that in the tows that leave New York nightly for up-river points "we have practically no limits; we take all that will come"; and explained that by "all that will come" he meant, "individual customers or people who have made arrangements with us. • • • We must have the order for the barge before the barges leave the stake boat." He further testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: "We would want to know something about them. If it was out of the blue, we would want

to know who he was, and what he had to go, before we would give him a price.". Sometimes prepayment of charges has been required. As to the breadth of applicant's willingness to transport: Witness testified that "Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract, and show him what kind of service we can give, and he gives us the contract." And again, respecting the daily towing schedules: "The business has been going on for so long that everybody knows it."

We find that the evidence dicloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, in itself constitutes one a common carrier.

Findings of Fact and Conclusions Thereon

Upon the evidence we find the following facts:

1. That this application was filed May 21, 1941, under section 309 (f) of the Interstate Commerce Act, which was within a period of 120 days after that section became effective, but expressly without prejudice to applicant's contention that it is not a carrier, does not transport any persons or property, and is not subject to part III of the act.

2. That applicant, with its own non-carrying vessels was engaged in towing non-self-propelled freight-carrying vessels in interstate or foreign commerce on January 1, 1940, within the limits of New York Harbor, as those limits are defined by us in Ex Parte No. 140, and, during the 1939 season of navigation, on the Hudson River as far north as Waterford, N. Y., and serving intermediate ports.

3. That it has continued so to operate since that date, down to the date of the hearing herein.

4. That on the aforesaid waterways applicant held itself out to tow between all intermediate points; and that it did tow to and from a sufficiently representative number of

points to constitute a fulfillment of its holding out as a carrier by towboat between all points on those waterways.

5. That its towage charges have been based upon the size and load-water draft of the vessels towed, and not upon the character of the freight loaded in said vessels except to the extent that the weight of the lading affects the draft of the vessel.

6. That its holding out was to tow non-self-propelled freight-carrying vessels which it considered in seaworthy condition, both loaded and empty, regardless of the character of freight loaded therein, for all who desired to engage its services and whom it considered financially responsible, and that it did so transport.

Upon these facts we conclude that applicant was in bona fide operation in interstate commerce as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels between all points within the limits of New York Harbor, N. Y. and N. J., as those limits are defined in our order of March 26, 1941, entered in Ex Parte No. 140, and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points; that such operation has been continued since that date; and that applicant is entitled under the "grandfather" clause of section 309 (a) of the act to a certificate of public convenience and necessity authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicant's operations, the requirements of part III of the act, and the orders, rules and regulations of the Commission thereunder.

The petition to dismiss the application will be denied. A certificate will be issued in acordance with these findings.

Referring to applicant's prayer, made without prejudice to its request for dismissal of its application, that it be held exempt from and not subject to regulation insofar as its towage services are performed wholly intrastate, irrespective of whether the vessels to which the towage services are rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce:

A railroad company engaged in moving the cars of others from one trunk line to another with its own locomotives is a common carrier engaged in interstate commerce and subject to the Safety Appliance Acts, even though its services are performed wholly within a State, and though it furnishes no cars, issues no bills of lading, and has no dealings with the shipper or with anyone on his behalf. *Belt Ry. Co. of Chicago* v. *United States, supra.* Likewise, when applicant tows the barges of other carriers, which barges are moving in interstate commerce, applicant engages in interstate commerce. Whether its participation in such interstate commerce is under the conditions embraced in section 303(f), thus exempting the tower from regulation and subjecting the towage to regulation as a part of, and in the same manner as, the transportation of the carrier from whom applicant receives or to whom it delivers the barges, we cannot determine upon this record because applicant did not make a full disclosure of the facts with respect to such towage. No order of exemption by us is required by towers whose towage is embraced in section 303(f). Commissioner Miller concurs in the results.

APPENDIX "F".

Certificate and Order.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 15th day of June, A. D. 1942.

No. W-359.

Cornell Steamboat Company—Contract Carrier Application.

The Cornell Steamboat Company having filed an application under the provisions of section 309(f) of the Interstate Commerce Act for a permit to continue operations as a contract carrier by water; a hearing having been held; and full investigation of the matters and things involved having been made, and said division, on the date hereof,

having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the public convenience and necessity require the continuance of operation by applicant as a common carrier by water by towage of non-self-propelled freight-carrying vessels of others, in interstate or foreign commerce, between all points within the limits of New York Harbor, N. Y. and N. J., as those limits are defined in our order of March 26, 1941, and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That this certificate and order shall take effect and be in force from and after July 24, 1942.

By the Commission, division 4.

W. P. Bartel,
Secretary.

(Seal.)

APPENDIX "G".

Interstate Commerce Commission.

No. W-359.

Cornell Steamboat Company Contract Carrier Application.

Submitted—— Decided——

Applicant found entitled to continue operations as a contract carrier by water, in the use of its towboats in towing barges, scows and similar vessels, loaded or light, between points in New York and New Jersey located on the waters of New York harbor, on a year around basis, and between those points and points on the Hudson River up to and including Waterford, N. Y., on a seasonal basis, by reason of having been engaged in such operations prior to and on January 1, 1940, and continuously since. Permit issued and petition to dismiss application denied.

Robert S. Erskine for applicant.
Stanley Carpenter for rail carrier protestants.
Reginald G. Narelle for water carrier interveners.

Report Proposed by Andrew C. Wilkins, Examiner.

By application filed May 21, 1941, Cornell Steamboat Company, a New York corporation, with its principal office at Kingston, N. Y., seeks a permit under the provisions of section 309 (f) (g) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water in interstate or foreign commerce, in furnishing under individual contracts or agreements the services of its fleet of tugboats in towing barges, scows, and similar vessels carrying their cargoes either below or on deck, from and to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., harbor points located in New York or New Jersey on the waters of the lower Hudson and the adjacent waters of New York harbor. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the Act.

On May 21, 1941, applicant filed a petition to dismiss its application on the grounds that, in the performance of its business of furnishing towage services as above described, it does not engage in nor perform nor furnish any transportation of passengers or property within the language and intent of the provisions of part III of the Act, and, therefore, is not subject to and does not come under the regulations of the Act. Without prejudice to its request for dismissal on those grounds, applicant further prays that it be held exempt from and not subject to regulations of the Act insofar as its towage services are furnished wholly intrastate to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered or any cargoes or property on board those vessels are or may be engaged in intrastate movements.

At the hearing rail carriers in Official Classification Territory appeared by counsel as protestants but offered no evidence. The Northeastern Inland Waterways Association appeared as an intervenor by its president, and indicated an interest in developing all of the facts for the record, but offered no evidence. These intervenors will have a further opportunity to clarify their positions for the benefit of the Commission in any exceptions to the proposed report herein, which they may file.

Applicant was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president, who has held that position for the past 29 years. From its inception the business of the applicant has been and still is completely owned by succeeding generations of the same family. At the time of the hearing applicant owned and operated a fleet of upwards of 33 towboats, varying in power and size, some of which are powered by steam and others by diesel engines. One scow is maintained in connection with its repair equipment but applicant does not own or operate any barges or lighters or similar type of carrying craft. No cargoes of merchandise for hire or passengers are carried on any of the towboats and they are used exclusively in towing for applicant's customers, over 70 percent of whom are shippers who own

or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers.

Towing services are rendered for customers in New York harbor and anywhere on the Hudson River up to Waterford, which is between the Troy lock and the entrance to the Erie Canal. Operations between points bordering on New York harbor are conducted on a year around basis but those on the Hudson are suspended during the season when ice prevents them, which is generally from the early part of December to about the middle of March. Applicant does not render any towing services on the ocean outside of the limits of New York harbor, as determined by the Commission in its order entered March 26, 1941, in Ex Parte No. 140.

The largest part of applicant's business is done on time contracts entered into for a period of years, while some contracts run for a single year and the balance consists of a small amount of miscellaneous contracts arranged from day to day. Arrangements for all of its towing services, whether for more than a year or for an individual job, are based on separate agreements or contracts. Most of the vessels towed are scows which carry their cargoes on deck and deep boats or barges which carry the cargoes below deck in the hold. The basis for charges for the towing services has no relation to, or any connection with the amount of the freight charges paid by the owners of the cargoes for their transportation when they do not also own the scows or barges. The only interest applicant has in a cargo is its weight and the size of the scow or barge on which it is loaded. The rate charged for towing is lower for the larger units. For example, the rate per ton for towing a 2000-ton barge would be less than the rate per ton for a 200-ton barge. The rate is also lower if the scow or barge is towed with others in a flotilla which applicant schedules for its customers to leave New York harbor on certain days of the week and to leave Albany, N. Y., or some other point on the upper Hudson certain other days of the week. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. If a cus-

tomer desires individual service on a certain day the rate is necessarily higher.

No holding out of any offer of towing services is advertised by applicant in any daily papers or trade journals. Its witness thought that a simple announcement of towing services had been carried in the Bullinger's Guide for many years. An examination of the 1939, 1940 and 1941 editions of that guide fails to disclose such an announcement. Its business has been built up with certain individual customers over the many years of its operation. It has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, the requirement of a release from all liability, and when the requested service could not be rendered without injury to service desired by one of the regular customers.

Applicant does not issue any bill of lading or similar document with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the towboat nor any other employee of applicant has anything to do with the cargoes on the vessels in the tow. Applicant generally has no interest in or knowledge of the origin or final destination of the cargoes, and when the towing service is complete with the landing of the vessel at the place agreed upon, no further services are rendered. No arrangements for any through movement, of which the towing services might be a part, are ever entered into by applicant with any other carrier. Therefore, the towing services rendered by applicant between points in the State of New York are, insofar as intrastate cargoes are concerned, intrastate in character and are not subject to regulation by this Commission. See section 302 and section 303(j)(k) of the Act. Approximately 95 percent of the towing services of applicant are rendered between points in the State of New York. However, these services are sometimes rendered in connection with interstate cargoes, and applicant requests that such services, irrespective of whether the vessels or their cargoes are or may be engaged in interstate movements, be held exempt from regulation. The Commission has no authority to hold such services exempt from regulation. It does have the discretion under

the provisions of section 306(e) to grant relief to contract carriers with respect to the filing of minimum rates and charges and observance thereof. But the evidence in the present record does not warrant the exercise of that discretion herein. Moreover, applicant has on file with the Commission its tariff I. C. C. No. 2, containing schedules of its minimum rates and charges for the performance, as a contract tower, of only such towage services as it may see fit to undertake on the Hudson River between Waterford, N. Y., and New York, N. Y. and on the waters of New York Harbor and the waters adjacent thereto, and intermediate points.

A check of applicant's records for the year 1940, which is considered fairly representative of its annual business for the past ten years, shows that only 4.4 percent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River or New York Harbor and points outside the harbor in New York State. Regardless of the small proportion of the services rendered in connection with interstate movements it will be necessary for applicant to have a permit if it continues to render such services.

Towing services rendered by applicant in connection with interstate cargoes between points within the limits of the Harbor of New York, N. Y., when such services are not a part of a continuous through movement under common control, management, or arrangement to or from a place outside the limits, have been exempted from regulation by the order of March 26, 1941, entered by the Commission in Ex Parte No. 140, pursuant to the provisions of section 303(g) of the Act.

Upon brief applicant reaffirms the position taken in its petition to dismiss its application herein. It contends as follows:

> 1. That there are none of the distinctive features of carriage in applicant's business, in that he does not carry anything, does not have possession of either cargoes or passengers, has no direct or indirect connection with any contract of carriage, has none of the

responsibilities of a carrier, and that he is not a carrier and is not engaged in the business of a carrier.

2. That by the plain language of the Act, the only persons or parties who are required to apply for certificates or permits and to whom the Commission has authority to issue them, are carrriers; and as applicant is not a carrier it necessarily follows that the Commission has no authority to issue to or require applicant to hold a permit as a contract carrier.

3. That the Commission may regulate tugs and towage services which are owned and used as a part of the business of carriers subject to its regulation, but that nothing in the statutory definitions of "transportation facility" and "transportation" in section 302(g) and (h) gives to the Commission the authority to regulate tugs or towage services of an independent tower, who is not engaged in the business of "carrying" and who is not a "carrier."

4. That the administrative ruling of the Bureau of Water Carriers to the effect that a towing company such as applicant must be regarded as being a "carrier" subject to the Act if it performs towage for a shipper or anyone not a carrier subject to the Act, is apparently based on a backhanded, or negative interpretation of the language of section 303(f)(2), and has no logical foundation and is contrary to the plain intent of Congress that section 303(f)(2) should eliminate and exempt incidental services *even when* performed for a carrier subject to part III.

5. That in instances in which the use of tugs or towage services are furnished *in fact* by the carrier itself, they are an integral part of the carrier's business, and subject to regulation just as other phases of his business; but such instances lend no support to a conclusion that a tower like applicant, who merely performs towage services as herein described,

is engaged in the business of a contract carrier by water.

6. That under the common meaning of the words it has long been an accepted fact that a "tower" is not a "carrier", and it must be assumed that when Congress, throughout all of the provisions of part III of the Act, limited those provisions to carriers by water, either common or contract, it intended to give the words their ordinary meaning, and did not intend to authorize the Commission to regulate anyone other than such a carrier.

The above is a brief outline of the main points argued in considerable detail by complainant in its brief, which includes excerpts from certain court decisions cited in support of the above contentions, all of which have been given careful consideration in arriving at the conclusions and finding hereinafter recommended.

Upon the record herein the Commission should reach the following conclusions: that the definitions of "transportation facility" and "transportation" as set forth in section 302(g) and (h) when applied to the towing services of applicant in the use of its towboats, which are instrumentalities or equipment, in connection with transportation by water, subject to part III, brings applicant within the definition of a "contract carrier by water" set forth in section 302(e), and subject to regulation under the Act; that the provisions of section 303(f)(2) do not have the effect of exempting transportation by water furnished by any person to a shipper or a carrier not subject to parts I, II or III of the Act, nor do those provisions entirely exempt such transportation from regulation when furnished to carriers subject to parts I, II or III, but rather they make such transportation subject to regulation in the same manner as the transportation by such carriers to which such services (performance of floatage, car ferry, lighterage, or towage) are incidental; that it does not appear that the towing services, rendered by applicant to water carriers from and to points outside the limits of New York Harbor are incidental to any transportation services rendered by

such carriers but rather the entire or principal transportation services are rendered by applicant in towing the scows or barges for those carriers, since there is no evidence that those carriers have undertaken to perform under published rates, have performed, or expect to perform any transportation of the scows or barges in addition to the transportation services performed by applicant whereby the towage services of the applicant could be considered "incidental" to any transportation performed by such carriers; and that it must be concluded that the towage services performed by applicant for carriers from or to points outside the limits of New York Harbor, which are not shown to be incidental to any transportation performed by such carriers, and not otherwise exempt under the Act, are not exempt under the provisions of section 303(f)(2); that applicant having been in bona fide operation as a contract carrier by water in the performance of both regular and seasonal towage services prior to, on and since January 1, 1940, over the route or routes and between the ports above described, and having filed its application for a permit within the time limit and in conformance with the other provisions of section 309(f)(g), is entitled to such a permit; and that the petition to dismiss its application for a permit should be denied.

The Commission should find that applicant was in bona fide operation on January 1, 1940, as a contract carrier by water, in interstate or foreign commerce, in the use of its towboats in towing barges, scows and similar vessels loaded with cargoes or light, between points in New York and New Jersey located on the waters described as included in New York Harbor in the order entered March 26, 1941, in Ex Parte No. 140, on a year around basis, and prior to January 1, 1940, between those points and points on the Hudson River up to and including Waterford, N. Y., on a seasonal basis, ice on the river permitting, from about the middle of March to the early part of December; that such year around and seasonal operations have been continued since that date; and that applicant is entitled to a permit as a contract carrier by water, authorizing the continuance of such year around and seasonal operations, subject, how-

ever, to general conditions which are necessary to carry out, with respect to the continuation of applicant's operations, the requirements of part III of the Act, and the orders, rules, and regulations of the Commission thereunder.

An appropriate permit should be issued and an appropriate order denying the petition to dismiss the application should be entered.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Petition for Appeal.

Civ. 21-35.

CORNELL STEAMBOAT COMPANY, *Plaintiff*,

against

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*,

and

BOSTON TOW BOAT COMPANY, *Intervening Plaintiff*,

and

NATIONAL WATER CARRIERS ASSOCIATION, INC., *Intervening Defendant.*

Your petitioner, Boston Tow Boat Company, respectfully prays that, in accordance with 28 U. S. C. Secs. 47 and 47a, the appeal of Boston Tow Boat Company, intervening plaintiff in the above entitled action, from this Court to the United States Supreme Court from the decree in judgment entered herein on August 2, 1943 be allowed, and that the bond for costs on appeal with good and sufficient surety in the sum of $250, submitted herewith, be approved.

The said intervening plaintiff submits herewith for filing its assignment of errors and adopts by reference the

statement as to the jurisdiction of the United States Supreme Court filed in this action by Cornell Steamboat Company, plaintiff petitioner for appeal.

Dated, New York, August 30, 1943.

BINGHAM, DANA & GOULD,
ALBERT T. GOULD,
CHARLES S. BOLSTER,
By CHARLES S. BOLSTER,
A Member of the Firm,
1 Federal Street,
Boston 10, Massachusetts.

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